

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

No. 1:22cr29-1/5

vs.

BRENDON GAGNE,
JOSHUA FORD,

Defendants.

Before:

THE HONORABLE ROBERT J. JONKER,
U.S. District Judge
Grand Rapids, Michigan
Tuesday, October 4, 2022
Motion to Dismiss Proceedings

APPEARANCES:

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On behalf of the Plaintiff;

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6 On behalf of Joshua Ford.

7 Also Present: Mark Markowski, PIS.

8 REPORTED BY: MR. PAUL G. BRANDELL, CSR-4552, RPR, CRR
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1 10/04/2022

2 (Proceedings, 2:59 p.m.)

3 LAW CLERK: The United States District Court for the
4 Western District of Michigan. The Honorable Robert J. Jonker,
5 United States District Judge, presiding.

6 THE COURT: We're here on the case of the United
7 States against Brendon Gagne and Joshua Ford, 1:22cr29. We
8 have motions on the calendar today, and let's start with
9 appearances, please?

10 MS. CAROWAN: Good afternoon, Your Honor. Stephanie
11 Carowan and Justin Presant appearing on behalf of the United
12 States. We are joined at counsel table this afternoon by
13 Special Agent Matt Markowski of the United States Postal
14 Inspection Service.

15 THE COURT: All right. Thank you.

16 MS. COBB: And Good afternoon, Your Honor. Britt Cobb
17 with my client, Brendon Gagne.

18 THE COURT: Gagne. I'm sorry.

19 MS. COBB: No. It's quite all right. I did the exact
20 same thing. I'm sure many people do, but it's nice to see you
21 this afternoon.

22 THE COURT: All right. Thank you. Likewise.

23 MR. GLEESON: Good afternoon, Your Honor. Gerald
24 Gleeson on behalf of Mr. Ford, who is seated to my right.

25 THE COURT: All right. Thank you. Welcome everybody.

1 So I have certainly read the briefing materials from
2 the parties. I don't think there was any reply filed, so what
3 I have are the principal briefs from Ms. Cobb joined at least
4 as to Count 1 by counsel for Mr. Ford, and then the
5 government's response on all of it. Anything else I should
6 have received from the government?

7 MS. CAROWAN: No, Your Honor.

8 THE COURT: Or from the Defense?

9 MS. COBB: Not from Mr. Gagne.

10 MR. GLEESON: Not for Mr. Ford, Your Honor. Thank
11 you.

12 THE COURT: All right. Good. Let me start out with
13 Ms. Cobb then, and give you a chance to summarize your
14 position, respond to anything you want from the government
15 brief and go from there.

16 MS. COBB: Excellent. Thank you, Your Honor.

17 I do have a few comments I would like to make as to
18 both counts. I know that the Court will have read everything
19 and looked into it, so I certainly don't intend to go back over
20 what I've already written, but I do have some things I'd like
21 to say --

22 THE COURT: Sure.

23 MS. COBB: -- in reply to the government's papers.

24 THE COURT: All right.

25 MS. COBB: And I guess, I thought maybe I'd just start

1 out by letting the Court know kind of where we are coming from
2 with some of this material.

3 I think I have had a lot of questions about this case
4 from the outset. Not from a conduct perspective. The conduct
5 is relatively straightforward, and I know the Court has
6 presided over a lot of plea hearings and probably knows a lot
7 about the conduct. And frankly, Mr. Gagne has given a couple
8 of statements to law enforcement. So the conduct doesn't sort
9 of perplex me. It's the government's legal theories and its
10 approach to kind of scope and sentencing issues that have been
11 perplexing.

12 As the Court can probably tell from our motion to
13 dismiss, we are perplexed, I think, in Count 1, which charges a
14 371 offense clause, conspiracy to smuggle based on regulatory
15 violations. Sort of perplexing that's the charge, but the
16 government is wanting to cast this as this very, you know,
17 broad fraud, even though there is no intent to defraud alleged
18 in the indictment.

19 And then, of course, we are perplexed by in Count 2
20 with the government taking what appears to be in our view kind
21 of garden variety financial transactions that are part of the
22 smuggling conspiracy and calling it money laundering.

23 So the government's response to our motion probably
24 left me with more questions than it answered, and so I am
25 pleased that we are having this discussion today because

1 knowing the Court, I think that even if it doesn't end up
2 agreeing with us that the counts should be dismissed, perhaps
3 this discussion and the Court's findings on some of the legal
4 issues will help shape how -- you know, tell us how we should
5 be thinking about some of these things as we evaluate the
6 contours of a trial or plea and sentencing.

7 So with that, to address the smuggling count, what we
8 have alleged in our motion is that the offense in the
9 indictment -- that the indictment states in Count 1 basically
10 doesn't exist because misbranding of prescription drugs and
11 controlled substances occurs for not having a prescription
12 occurs kind of downstream after the articles have already been
13 shipped in interstate commerce while being held for sale, and
14 this is evident from the statutes that are cited in the
15 indictment. Misbranding under 331 or not having a prescription
16 is contrary to 353(b)(1), which specifically states that drugs
17 dispensed without a prescription are deemed misbranded while
18 held for sale, and then made a violation of law under -- a
19 misdemeanor violation of law under 331(k), which says the same
20 thing, and adds that -- and specifies that they are misbranded
21 while held for sale after shipment in interstate commerce.

22 So the idea is that if the drugs are not misbranded
23 until they are held for sale the contrary to law provisions of
24 the smuggling statute, 545, can't be met, because the
25 misbranding violation does not occur at the time of the

1 importation. And it's pretty clear, and I actually don't think
2 there seems to be any dispute from the government that the gist
3 of the smuggling offense is getting something into the country
4 illegally. So there needs to be something illegal about the
5 importation itself, not the ultimate uses.

6 We read the 841 reference in the indictment to mean
7 that the conspiracy involved misbranded prescription drugs and
8 controlled substances. We read that to mean that the
9 government was alleging that both were illegal for not having a
10 prescription because controlled drugs are -- they are subject
11 to the same misbranding rules as noncontrolled drugs. I am
12 reading the government's papers in response to say, no, 841 is
13 in there because a smuggling conspiracy can be found under the
14 contrary to law provisions for dispensing, distributing or
15 possessing with the intent to distribute a controlled substance
16 under 841. But dispensing is specifically defined as delivery
17 to the end user in the CSA, and of course, distributing or
18 possessing with the intent to distribute both have some element
19 of, you know, actual or constructive possession, something
20 that, of course, is not present when items are still in
21 international commerce.

22 So I think that 841 under either theory also suffers
23 from the same defect, that it's not illegal at the time of the
24 importation. And the controlled substance, the CSA, does have
25 its own provisions for importing controlled substances. 21 USC

1 952 and 960 separately criminalizes importation. So if
2 distribution or possession with the intent to distribute
3 occurred at the time of importation there would not really be
4 any need for those statutes.

5 So the government says, well, misbranding or not
6 having a prescription is not the only type of FDA violation we
7 intended this charge to cover, and the government says in its
8 papers we should be thinking about Count 1 as an offense to
9 conspiracy -- an offense to smuggle goods that are misbranded
10 because of all kinds of other regulatory problems. They talk
11 about these drugs being unapproved, and therefore, illegal
12 under 331(d) when introduced into interstate commerce. But
13 it's not what count 1 alleges. I mean, Count 1 alleges
14 specifically misbranding under 331. Misbranding violations are
15 found at 331(a), (b), (c), (g) and (k). Unapproved drugs are
16 prohibited at 331(d). They are different things, and that is
17 not what the indictment alleges. Nothing defines unapproved
18 drugs as misbranded.

19 The government also says the drugs were misbranded
20 because § 352(f), involving inadequate directions for use, was
21 violated and that's misbranding. Again, that's new. That's
22 not alleged in the indictment. There is nothing factually in
23 there that tells us that improper warnings were what the grand
24 jury considered or that we should be thinking about as
25 something that we need to defend at trial.

1 The same thing is true with the government's assertion
2 that the items were misbranded under 353(b) (4) (A) because they
3 did not bear the Rx symbol on them. It's also new and not in
4 the indictment. I think I counted 10 places in the indictment,
5 either in overt acts or the introduction or the substantive
6 parts of Count 1 where the indictment alleges that the
7 illegality of these drugs is that they were ordered without the
8 customers ever having to provide a prescription.

9 There is no indication that the grand jury thought of
10 any of these other theories or that we should be prepared to
11 defend against those things even if that now is what the
12 government says it may want to prove.

13 So those are my comments as they relate to Count 1.
14 Shall I move onto Count 2?

15 THE COURT: Let me ask a couple questions about it
16 before you go to Count 2. On the last point you raise, and I
17 am just looking at page 8 of the indictment, right above manner
18 and means. It says, "The object of the conspiracy was to
19 import unapproved, foreign manufactured prescription drugs and
20 controlled anabolic steroids into the United States." So I
21 recognize there is a lot of language in here about misbranding.
22 No prescription. But that's a pretty generic object that would
23 seem to cover the other items the government says would be
24 responsible for contrary to law importation, including
25 unapproved foreign manufactured drugs --

1 MS. COBB: Well, and as I read this, Your Honor, the §
2 545 offense, which is what they are alleging there was a
3 conspiracy to commit, that the agreement among the parties was
4 that they knew these drugs required prescriptions. That is --
5 that is how I am reading the agreement, is the agreement was,
6 we are going to import drugs that require a prescription and we
7 are not going to ask for one, and I think that's what the
8 government should be tied to.

9 THE COURT: -- okay. More narrowly, one other item
10 that I think the government brought up in response on Count 1,
11 was, look, even if the Defense is right about the narrow
12 definition and sense of "dispense" as a downstream exchange to
13 an end user, it's still okay as we have pleaded it here because
14 the prohibited or contrary to law activity would include X, you
15 know, causing eventually that downstream handing off to an end
16 user without prescription. And what's your response to that?

17 MS. COBB: I think my response to that, Your Honor,
18 sort of relates to the fact that they -- that when you are
19 dealing with the smuggling offense itself and what makes it
20 contrary to law, it's not the overall agreement. It's was the
21 thing illegal at the time it got to the border? And I don't
22 know why the FDA code is written as it is. I am -- I have not
23 sort I haven't gotten into it that far, but it is very specific
24 about dispensing drugs probably for all kinds of reasons
25 related to, you know, how many hands touch these things before

1 they are actually dispensed to a human being for consumption?
2 But that's the way they are -- they are written, and we -- the
3 statutes are very specific that they don't become misbranded
4 until they are being dispensed after shipment in interstate
5 commerce while being held for sale.

6 THE COURT: Okay. And why don't you go onto Count 2,
7 then, and let me get your position on that.

8 MS. COBB: Yeah. Count 2 -- and I have to be very
9 honest. I have never seen money laundering charge this way, so
10 this was an interesting exercise for me that I probably spent
11 way more time on than I should have, but what the indictment
12 lists is planned transactions that constitute money laundering
13 conspiracy are already basically baked into this smuggling
14 conspiracy because they are listed as overt acts.

15 Paying suppliers and paying distributors and moving
16 money to make those payments are just part of the conspiracy
17 that's described in Count 1. They are ordinary transactions
18 and expenses, which is exactly what Justice Scalia said in
19 Santos are the normal transactions of crimes for which there
20 shouldn't be a higher penalty for money laundering. He said,
21 few crimes are free from costs and not all expenses are paid in
22 advance.

23 You know, it's one of these things if you look at in
24 this way, everything can be money laundering just like pretty
25 much every federal offense can also be a tax offense, right?

1 And so when that happens and the penalties for money laundering
2 is much higher, this Santos framework says the proceeds have to
3 be described as profits, and they weren't. The government says
4 we are wrong about this for a whole bunch of different reasons,
5 but at the end of the day I think that all of its criticisms
6 are addressed in the cases that we have cited.

7 For example, the government says merger is never an
8 issue when concealment money laundering is charged. That's
9 incorrect. The two cases it cites to support that, Wilkes and
10 Buffin, they did analyze whether a charge of concealment money
11 laundering merged with a substantive offense ultimately finding
12 that they did not under the facts of the case but in no way
13 holding that concealment money laundering ever merges, just
14 that it didn't happen to there. There are other cases cited in
15 the brief, I think in our brief, Meade and Jamison, where
16 concealment money laundering allegations are also discussed in
17 the context of merger. So it may be that that is a less common
18 way for there to be a merger problem, but nothing holds that
19 concealment charges can't merge. And really ultimately here, I
20 think because the money laundering conspiracy is charged under
21 both the concealment and promotional theories in a single
22 count, I mean, if either one merges that count is defective
23 because profits aren't alleged as to either theory.

24 The government, I believe, is also incorrect when it
25 states that the merger issue cannot be decided pretrial. I get

1 it that most of these cases deal with a post-trial analysis,
2 and it does cite a number of out-of-state district courts for
3 this idea that it can't be decided pretrial, but obviously
4 those cases are of no precedential value, and more importantly,
5 they don't say that. They are cases where those district
6 courts decided not to decide the merger issue pretrial, but
7 they didn't say that they couldn't. And we cited in our brief
8 a Sixth Circuit case where the sufficiency of the indictment,
9 based on a potential merger problem, was addressed, and that's
10 the case of Meade.

11 I would also note that in one -- another one of the
12 cases in our brief, U.S. versus Olive, the Sixth Circuit stated
13 that whether to define proceeds or profits in any given case
14 should be known with certainty at the outset because it affects
15 charging, plea negotiations, trial strategy, jury instructions,
16 that kind of thing. So clearly profits versus proceeds are
17 something the Sixth Circuit thinks should be defined properly
18 from the beginning, and I think the Court can do the same and
19 Rule 12 requires us to raise it.

20 And finally, the government is incorrect that the fact
21 that Count 1 charges a conspiracy means that there can be no
22 merger problem. It says merger never arises in the context of
23 conspiracy, and that that is not right. In the Crosgrove case
24 cited in our brief, also a Sixth Circuit case that has been
25 cited many times by the Sixth Circuit, there was merger of a

1 mail fraud conspiracy and a money laundering conspiracy because
2 the overt acts that the substantive conspiracy listed were the
3 same transactions the money laundering conspiracy was relying
4 on. So what that case tells us is that, in our Sixth Circuit
5 at least, if planned financial transactions in a money
6 laundering conspiracy are listed as overt acts in the predicate
7 conspiracy, a merger problem can arise.

8 And we have the same thing here. Payments to
9 co-conspirators for their participation in the scheme are
10 listed as overt acts. Drugs being purchased from overseas
11 suppliers are listed in overt acts. Transferring payments made
12 with traditional currency to cryptocurrency are listed in the
13 overt acts, and so we ask the Court to consider that under that
14 rational merger -- a merger problem is created here.

15 And then the last point I wanted to make, Your Honor,
16 a footnote in the government's brief says that all of the
17 laundered funds were indeed profits. Now, obviously, it's not
18 allege that, and of course, there is no indication the grand
19 jury found that, but I would be interested to know if the
20 government is conceding or if the Court thinks that profits is
21 the proper way to measure proceeds here even if the count is
22 not going to be dismissed? So that's all I have on that one,
23 Your Honor.

24 THE COURT: Okay. Thank you.

25 MS. COBB: Thank you.

1 THE COURT: We'll see if Mr. Gleeson has anything he
2 wants to add from the Defense perspective?

3 MR. GLEESON: No, Your Honor. Thank you for the
4 opportunity.

5 THE COURT: Then we'll go to Ms. Carowan.

6 MS. CAROWAN: Thank you, Your Honor.

7 So backing up first to Count 1, and I think it's
8 important, as the Court is well aware having read the parties'
9 briefing, to sort of look at what has to be in an indictment
10 for it to be sufficient? It has to inform the Defendant of the
11 elements of the offense and essentially fairly inform him of
12 the charge that he is facing.

13 As the Supreme Court held in Hamling, the language of
14 the statute alone is usually sufficient for a charge to be
15 sufficiently pled. In reviewing the indictment the Court takes
16 all of the allegations as true and makes all inferences in
17 favor of the government at this particular point. The Court is
18 also encouraged to make more of a common sense review of the
19 indictment, rather than a more hyper technical review sort of
20 separating out individual paragraphs and things like that.

21 So with that in mind, looking at Count 1 in this case,
22 I think, first of all, it's important to point out it's charged
23 as conspiracy. The essence of conspiracy is agreement. Much
24 of what Ms. Cobb just said had to go to in large part if we had
25 charged her client with substantive drug smuggling. That is

1 not what is charged. What is charged is the agreement. It
2 doesn't matter if that agreement is successful. It doesn't
3 matter if the Defendant agreed with every part of that
4 conspiracy. All you need is knowing agreement and an overt act
5 in furtherance of that agreement.

6 You have that as pled in Count 1 here. It is -- it is
7 alleged as an agreement to smuggle misbranded, unapproved
8 foreign manufactured prescription drugs and controlled
9 substances into the country illegally in order to fulfill the
10 orders placed by customers on the Defendant's website,
11 expresspct.com.

12 And in preparation for today I actually went back and
13 looked at the charging language in Count 1 because that is
14 really what governs the analysis here, and again, it tracts the
15 language of the statute and what is required of conspiracy, and
16 it charges that the Defendants knowingly agreed. It then talks
17 about what the object of that agreement was, which was here to
18 smuggle goods into the United States contrary to law. It cites
19 the code section of that, which is 18 USC 545, and it doesn't
20 stop there.

21 That was sort of the problem in White, which was one
22 of the cases cited by Ms. Cobb, and that's not what we have
23 here, because it doesn't just say in contrary to 18 USC 545
24 contrary to law, figure it out. It gives more information. It
25 goes onto say misbranded prescription drugs. It then says

1 controlled substances.

2 And then I think it's telling -- and Your Honor sort
3 of caught on this and I think that's important. It says the
4 object of the conspiracy was to import unapproved foreign
5 manufactured prescription drugs and controlled anabolic
6 steroids. That's the merchandise alleged to have been smuggled
7 as part of the agreement into the United States illegally. And
8 then the indictment cites the statutes that make that very
9 merchandise contrary to law, and it refers both to 21 USC 841,
10 which is the illegal drug distribution and possession with
11 intent to distribute statute, and then it cites 21 USC 331.

12 Looking at all of this together, Your Honor, that is
13 what Hamling requires for Count 1 to be properly pled. Right
14 there on page 8. That is sufficient based on all the standards
15 at play here.

16 But Ms. Cobb and her client urge us to sort of look
17 into the facts, which ultimately ends up being a province for
18 the jury at the end of the day, but if we want to look at them,
19 it's fairly straightforward. The multiple objects of the
20 conspiracy, controlled substances, misbranded prescription
21 drugs, and foreign manufactured and unapproved prescription
22 drugs.

23 841, despite Ms. Cobb's argument to the contrary, is
24 fairly straightforward. It prohibits the possession with
25 intent to distribute and the distribution of controlled

1 substances. It's fairly straightforward on its face what that
2 is, and as a result he didn't even challenge that in the
3 written motion. There is nothing about the 841 reference that
4 is cited in Ms. Cobb's original filing to this Court saying
5 anything is wrong with the 841 citation. That alone makes
6 Count 1 sufficient as pled.

7 It also cites 21 USC 331, which is, as I am sure the
8 Court is aware, a multipart statute. There are many, many ways
9 and many prohibited acts codified under 331. I went through it
10 this afternoon. It goes from subpart (a) all the way to
11 subpart (ddd) are all of the prohibited acts that are
12 prohibited under 331.

13 The indictment cites 331 generally. It doesn't say
14 this section specifically and only this section. It cites 331
15 generally, so it's not limited to one subpart.

16 Before getting into the subparts that Ms. Cobb
17 addressed, I would point out the Court is absolutely right that
18 331 prohibits committing certain acts and also causing the
19 commission of those acts, and I don't think there is anything
20 in the indictment as pled that demonstrates anything but that
21 the Defendants were absolutely responsible for causing every
22 single step in this agreement from the agreement to the
23 shipping of the drugs from overseas, every single step in this
24 agreement. So I think that's important because the causing
25 thereof is not in every single statute but it is here, and

1 because it's here it has to have meaning by itself.

2 Looking at the particular subsections of 331 that I
3 think both parties cited, 331(a) prohibits the introduction in
4 interstate commerce of a drug that is misbranded. There are
5 many ways a drug can be misbranded. One of those, which I'll
6 get to in a moment, is a drug that is dispensed without a
7 prescription, but there are other ways that a drug can be
8 misbranded as well, including not having proper labeling, not
9 indicating Rx only for example, and also just by the drug not
10 being approved by the FDA for distribution in the United
11 States.

12 And the drugs we are talking about here, to be fair,
13 are approved for distribution in the United States by a certain
14 U.S. based pharmaceutical manufacturer. Eli Lilly, for
15 example, is allowed to distribute Cialis in the United States.
16 The FDA has received an application, has gone through its
17 testing and analysis and approved that. What has not been
18 occurred -- what has not occurred, excuse me, is an approval by
19 the FDA for the foreign manufacturers here in India and other
20 places to distribute that same product here in the United
21 States but it's those foreign manufacturers where the
22 Defendants were getting their illegal product. That
23 distribution of unapproved drugs is, in fact, sufficient
24 because of the labelling that's required enough to make those
25 drugs misbranded.

1 And finally, 331(k) when you dispense a prescription
2 drug without a prescription, that makes it misbranded while
3 held for sale. Mr. Gagne and his counsel take this last
4 section and urge the Court to read it extremely narrowly to not
5 draw the inferences in favor of the United States and in favor
6 of the presumption of it being a valid indictment, but instead
7 to read it very, very narrowly to eventually say dispense is
8 only if I give the drugs to the end user.

9 I will agree with Ms. Cobb that giving the drugs,
10 dispensing the drugs to the end user is dispensing.
11 Absolutely. But dispense should be looked at broader, and I
12 think the definition cited by both parties indicate that. The
13 plain meaning of dispense is just to -- involves distribution.
14 It doesn't involve just distribution to one end user. Here
15 there is multiple layers of the distribution from one person to
16 the other as part of the agreement. And even the Controlled
17 Substances Act, which is the definition Ms. Cobb urges the
18 Court to adopt despite it being passed much later than the
19 Food, Drug and Cosmetic Act, includes packaging, labeling or
20 compounding necessary to prepare that substance for delivery.
21 Here all of those things happened before the drugs were ever
22 smuggled into the United States legally so that they could then
23 be further dispensed down the stream of commerce to the
24 ultimate consumer.

25 And again, Mr. Gagne and his co-conspirators

1 controlled every step of this process. They weren't just one
2 cog in the wheel. They were the wheel. They created the
3 website. They posted the drugs to the website. They placed
4 orders to India and other foreign manufacturers for the drugs
5 that they posted for sale on their website. They handled the
6 importation of those drugs to co-conspirators, and in fact,
7 managed to sort of decentralize that in order to not have those
8 drugs get flagged by customs. They then handled the shipment
9 of those drugs to a second line distributor and then handled
10 the actual distribution from that second line distributor to
11 the customers, and then they handled the payment side of things
12 as well. Every single step in this process was handled by the
13 co-conspirators. For all of these reasons, Your Honor, Count 1
14 is sufficient as pled.

15 I don't know if the Court has any specific questions
16 about Count 1 before I move onto Count 2?

17 THE COURT: So on Count 1, and this is not focused,
18 though, specifically on the motion to dismiss but the more
19 general concerns or issues that Ms. Cobb started with, because
20 even if I agree that Count 1 certainly survives the normal
21 pleading standard of fair notice and the like, at some point,
22 you know, the parties and the Court, we are going to have to
23 figure out what the theory is that gets presented to the jury.
24 And it's certainly true that prescription drugs or the lack of
25 prescription drugs comes up a lot more than anything else in

1 the Count 1 allegations. The generic language that I
2 referenced on page 8 and a couple other places reference
3 foreign manufacturer. So the first overt act says offering for
4 sale prescription drugs obtained from overseas pharmaceutical
5 companies without requiring the manufacturer to produce a
6 written prescription. I think in the overt acts that's one of
7 the few places the overseas aspect is mentioned, and even there
8 it's linked with the lack of prescription.

9 Now, as I pointed out in questioning Ms. Cobb, your
10 generic statement of the object is broader than that.
11 Certainly covers unapproved foreign manufactured prescription
12 drugs. But in terms of jury instructions, in terms of what the
13 Defense has to specifically prepare to meet and maybe even in
14 terms of whether the parties and eventually the jury or the
15 judge, if the judge gets to a conviction and sentencing, thinks
16 of this as more of a, you know, a regulatory problem, you know,
17 or a street drug distribution problem under Title 21, that's
18 the part that's a little unclear to me. I am not sure it
19 affects the validity of the charge, you know, in a motion to
20 dismiss.

21 But that's -- that's the thing I guess I am zeroing in
22 on, and what I would hate to do is come to final pretrial and
23 then get a litany of a whole bunch of things the government
24 thinks are contrary to law, quote-unquote, whether under 331 or
25 841, beyond what's clearly articulated in the indictment, which

1 seems to focus on the prescription nature of the products and
2 the lack of prescription.

3 So I don't know if that directly addresses the motion
4 to dismiss as much as it does the practicalities of going
5 forward and preparing the case for trial, but I invite your
6 comments on it if you are able?

7 MS. CAROWAN: Your Honor, I would point out that, yes,
8 the indictment does speak several times to prescription drugs
9 that were sold without a prescription. Paragraph 11 of
10 introductory allegations also talk about the drugs being
11 manufactured outside of the United States, including in India,
12 for example. So there are a number of other references, and
13 those introductory allegations are incorporated into Count 1 as
14 the first paragraph of Count 1. So I would just point that
15 out.

16 As far as jury instructions, I mean, we'll obviously
17 have to kind of take that as it comes. I will point out that
18 all of the theories of misbranding that we have talked about
19 this afternoon and that the government talked about as being
20 pled in the indictment are the subject of discovery. So they
21 have been provided to Defense counsel as part of the discovery
22 that we have provided in this case in order to allow them to
23 prepare sufficiently for trial on that issue.

24 So I mean, it's very clear from the discovery, for
25 example, that the drugs at issue are not marked Rx only for

1 example. So that is something as well certainly when we come
2 to crafting jury instructions I am sure the parties will have a
3 number of conversations hopefully well in advance of any
4 pretrial conference.

5 THE COURT: All right. Go ahead. You want to address
6 Count 2?

7 MS. CAROWAN: Thank you, Your Honor.

8 I found myself a little surprised, Your Honor, to hear
9 Ms. Cobb saying she's never seen money laundering pled like
10 this, because it's a fairly straightforward money laundering
11 conspiracy count. You know, it's -- and again, we are talking
12 about conspiracy and I think that that is important. It's
13 because, again, the essence of that is agreement, and when it
14 comes to money laundering conspiracy even less is required than
15 under 371 as charged in Count 1, and you just essentially need
16 agreement, the fact that the Defendant knowingly and
17 voluntarily joined that. You don't need an overt act. In
18 fact, you don't need a financial transaction. You don't need
19 proceeds to allege a money laundering conspiracy.

20 So sort of going down this profits proceeds sort of
21 rabbit hole isn't necessary to decide whether Count 2 is
22 sufficiently pled. It is sufficiently pled. It does, again,
23 outline the elements of the statute and pleads two different
24 ways of violating the statute, both promotional money
25 laundering and concealment money laundering.

1 I would vehemently disagree with Ms. Cobb that if
2 either one of those merges the Count is invalid on its face. I
3 think because it's pled in the alternative either one is
4 sufficient for that Count to be sufficiently pled and to go to
5 the jury.

6 That being said, I'll back up just a little bit. Let
7 me start with concealment money laundering. It doesn't
8 implicate merger. Yes. There are cases that talk about it. I
9 don't recall seeing one that found concealment money laundering
10 emergencies. And the reason it doesn't merge is that the
11 actions of concealment by and large happen after the
12 substantive SUA is complete. It's not using proceeds or
13 profits, whatever word you want to use, to, you know, pay a
14 front on drugs or something. It's separate and apart from the
15 SUA. And that's how it's pled here.

16 Ms. Cobb says several times, oh, all of the -- all of
17 the steps in the -- in the money laundering conspiracy, all of
18 the concealment are affirmative acts or overt acts of Count 1,
19 and I frankly disagree with her. There are a number of
20 concealment acts that occur, one of which is part of the drug
21 conspiracy where they talk about, hey, please don't put your --
22 anything specific on your payment that contract, just put your
23 order number. Sure. That's all part and parcel of the same
24 thing, but there is a lot that happens to that money after the
25 SUA is complete. At that point it's routed through

1 payanywayexchange.com. It is routed through the bank accounts
2 of Valiant Capital, which is essentially a sham company. There
3 is not an office or workers or employees or anything. That was
4 created by Mr. Funaro in part to funnel the money, to conceal
5 the money so it's run through Valiant Capital. It then goes
6 through, in large part, Mr. Funaro's personal accounts where
7 it's moved to cryptocurrency exchanges, multiple cryptocurrency
8 exchanges. Then it is -- then it is transferred into
9 cryptocurrency, and then it's shipped overseas to various
10 accounts. All of those steps conceal the source, location,
11 ownership of the proceeds. None of that has anything to do
12 with Count 1, and there is no merger. The concealment part is
13 very, very straightforward from the government's perspective.
14 We cited Wilkes, which was cited plausibly by the Sixth Circuit
15 in Buffin for those very reasons.

16 Turning to the promotional money laundering. Again, I
17 think things have been a little confused in the briefing. This
18 is not a situation where the drugs were obtained on front, as
19 you would see sort of in a normal typical 841, 846 drug
20 trafficking conspiracy where Co-Conspirator A gets a pile of
21 methamphetamine for free essentially initially. Rather than
22 paying for it goes and sells it, gets \$50,000, and takes it
23 back to his source of supply to pay for the \$50,000 worth of
24 methamphetamine he got on front.

25 If that were what was alleged then maybe there would

1 be a merger problem. That's not what is alleged. That's not
2 what happened here. What happened here is the co-conspirators
3 paid for the drugs they ordered. They ordered drugs through
4 Indian pharmaceutical companies and other pharmaceutical
5 companies and paid for them. They imported those illegally
6 contrary to law into the United States so that they could be
7 ultimately routed to consumers. They got the money for those
8 and then took the money and reinvested it in more drugs, thus
9 continuing the conspiracy.

10 That's different than paying a supplier on front.
11 That's what the cases that we cited in our brief where it
12 talked about, you know, we were going to use the proceeds of
13 meth trafficking to start a marijuana business. The fact that
14 it's, you know, some of the same drugs is irrelevant. It's not
15 all of the same drugs and they weren't repaying a debt. They
16 were paying to continue the conspiracy, and that's separate and
17 apart. That's not a merger problem under -- for the purposes
18 of promotional money laundering.

19 I will point out I think it's premature to have the
20 discussion about merger as it relates to the promotional money
21 laundering because there are a lot of facts that would be
22 presented to the jury ultimately, and I think those would be
23 something that should be considered rather than deciding it at
24 this early stage, but to the extent the Court takes it up at
25 this stage I think it is sufficiently pled. There is not a

1 merger issue as it is pled. They are not defraying expenses of
2 the conspiracy. They are, in fact, reengaging in a new
3 conspiracy and a new set of smuggling of drugs illegally, and
4 that is not a merger issue as laid out in the case law as cited
5 in our briefing.

6 Does the Court have any questions on Count 2?

7 THE COURT: I don't think I do right now. Thank you.

8 MS. CAROWAN: Thank you.

9 THE COURT: Ms. Cobb, do you have any rebuttal?

10 MS. COBB: I am concerned that the government is not
11 able to articulate a theory for Count 1. The agreement listed
12 in the indictment is the agreement to smuggle misbranded drugs.
13 There are 10 places in the indictment where bringing drugs into
14 the country without a prescription is mentioned. The Court
15 mentioned a couple of them. Paragraph 1 and 2 of the overt
16 acts specifically tie the out-of-country aspect of this to no
17 prescription. Paragraphs 1 and 2 of the introduction do the
18 same thing.

19 The object of the conspiracy is different from the
20 agreement. There is not going to be an instruction to a jury
21 about the object. It's going to be, did they agree to smuggle
22 based on misbranding in violation of 331 or 841? The object
23 isn't going to come into play.

24 And I think that if there is any good indication that
25 the government's theory is a moving target on Count 1, the fact

1 that it can't answer a very direct question is probably the
2 best evidence of that.

3 And as for the money laundering, Your Honor, again, I
4 think, and Ms. Carowan didn't address this, but you know, if
5 the promotional prong merges, the whole Count is defective, and
6 that clearly that promotional prong as alleged, those are
7 absolutely squarely addressed in the overt acts of the
8 smuggling conspiracy.

9 That's all I have. Thank you.

10 THE COURT: All right. Well, thank you to the
11 parties.

12 We don't get a lot of motions to dismiss an indictment
13 based on failure of the government to allege a crime, because
14 frankly, the standards under Rule 7 for stating sufficient
15 charge are pretty -- pretty general, pretty easy to meet.

16 I think the parties both agree Hamling against the
17 United States, 418 US 87, 1974, would provide the main
18 elements. There has to be, of course, a recital of the core
19 elements of the crime charged, which in this case are two
20 conspiracies. There needs to be fair notice of what is at
21 issue, which I think the Defense suggests maybe there isn't
22 here, and then there needs to be enough specificity so that the
23 Defense could later plead either an acquittal or a conviction
24 if necessary as a bar to subsequent prosecutions.

25 The government and Ms. Carowan points out that

1 particularly in the case of a conspiracy charge the level of
2 specificity certainly needs to articulate an agreement that if
3 it was made was unlawful but doesn't necessarily meet all the
4 same level of technical detail that you'd expect if there was a
5 charge of the underlying criminal activity itself, and I think
6 she cites the Fruehauf Corporation decision from the Sixth
7 Circuit for that, 577 F.2d 1038.

8 The Defense suggests that Count 1 is not sufficient to
9 state the crime of a conspiracy to smuggle. And I think
10 everybody agrees when we are talking about a conspiracy, at
11 least the conspiracy to smuggle, which is what Count 1 is
12 subject to, there needs to be, first of all, of course, an
13 agreement. That's the core of any conspiracy claim. And
14 secondly, proof that the Defendant joined the conspiracy, and
15 then in this case, smuggling conspiracy there would need to be
16 an overt act.

17 What I hear the Defense saying is, look, smuggling
18 conspiracy requires us and requires ultimately the government
19 to prove that there was a knowing importing into the country of
20 some merchandise that was done "contrary to law". That's
21 really the focal point of the dispute between the parties.

22 As a matter of whether or not the indictment states a
23 crime, I think the government has the better of the argument
24 and I will deny the Defense motion to dismiss Count 1 because I
25 think the indictment does fairly allege a conspiracy that

1 involved an agreement to smuggle within the meaning of the
2 applicable statute. I think it's 545, but I might have that
3 section wrong. In any case, the elements would require what I
4 said before, namely, the knowing importation of merchandise
5 into the country "contrary to law".

6 It's certainly true, as I indicated in my comments to
7 both sides, that there is a lot of language in the generic
8 background, in the description of the smuggling conspiracy
9 itself, that talk about prescription drugs, the need for
10 prescription and the lack of prescription, but I do think you
11 have to figure out what the government's theory is giving the
12 government the benefit of reasonable inference from what it
13 generically charges, and the most generic statement of the
14 charge that I see is the one I cited to Ms. Cobb toward the
15 bottom of page 8 where it says, "The object of the conspiracy
16 was to import unapproved foreign manufactured prescription
17 drugs and controlled anabolic steroids into the United States."

18 That's a pretty broad umbrella. I grant you that.
19 But the nature of most criminal indictments is broad umbrellas.
20 And under that umbrella, for sure the prescription drug aspect
21 that is later detailed in many of the overt acts and that is
22 earlier described in the indictment in the background language,
23 seemingly to focus on prescription is one way the government
24 can make out the charge here that it's made against the
25 Defendants if the proofs support it.

1 But I don't see that that limits the government from
2 relying on other theories that are within fair notice of the
3 documents, and right above the language that I have just quoted
4 the government specifically cites not just the smuggling
5 statute, which is Title 18, 545, but also, both the § 341 and
6 841 of Title 21 suggesting that the mere fact that these are
7 controlled substances, if that's what the proofs show, if they
8 were knowingly imported, would be enough to support the
9 conspiracy charge, and that there would also be other aspects
10 of potential misbranding or potential contrary to law
11 importation under any applicable section of 331. I don't think
12 anything requires the government to specify every possible
13 theory in the indictment even when it chooses to get specific
14 as to some.

15 As a practical matter, if the case proceeds to trial
16 we are going to have to get focused on that. Both sides will.
17 Maybe it's the kind of case where we need to have a final
18 pretrial with trial briefs and the like farther in advance of
19 trial than we ordinarily would to make sure we are all on the
20 same page, but I don't think it rises to the level of a defect
21 in the pleading instrument itself here, the indictment.

22 One other aspect on the Count 1 smuggling conspiracy.
23 The focal -- even sticking just for a moment with the Defense
24 view that really all Count 1 fairly charges is a contrary to
25 law element tied to the dispensing of prescription drug without

1 a prescription, let's take that for purposes of argument, and I
2 don't think it's fair to limit the government's charge to that,
3 but if it were, I still don't think the Defense would have a
4 basis to dismiss this indictment because as I indicated, the
5 language of the statute here does include causing this to
6 happen. So even if dispensing downstream to an end user
7 without a prescription, you know, obviously can't happen until
8 the goods are inside the United States. It would still mean
9 that if the agency includes Defendants, if the way the drugs
10 got into the United States in the first place on their
11 inevitable way downstream to the dispensing without a
12 prescription is proven to a jury's satisfaction to involve this
13 Defendant or these Defendants' activities, then I think that
14 would be sufficient to support a conviction for the smuggling
15 conspiracy charge.

16 So bottom line from my perspective is, I don't think
17 that there is a basis to dismiss the charge in Count 1. I
18 think the general Rule 7 pleading standards are satisfied.
19 There will have to be some narrowing, tailoring, and focusing
20 for trial, and if there is a conviction there certainly will be
21 disputes among the parties as to what the propriety of, you
22 know, guideline determinations are, but that's all downstream.
23 That's not here today as a basis to dismiss Count 1 in my
24 opinion.

25 Count 2 is a money laundering conspiracy. So once

1 again, we have the conspiracy elements, an agreement here
2 joined by the Defendants, and I think Ms. Carowan is right that
3 in the case of the money laundering conspiracy the statute
4 provides an independent wrong -- as an independent wrong than
5 money laundering conspiracy itself, so I don't think we'd have
6 an overt act requirement there.

7 And here, like Ms. Cobb I guess, I was intrigued by
8 the Santos crowd issue because I don't think I've had that come
9 up specifically for me in prior litigation either. But before
10 we get to that, specifically with respect to this charge --
11 well, I guess, we can in effect get to go it. Let's start with
12 the concealment prong.

13 I think the government can rely for Count -- the Count
14 2 conspiracy on either promotional money laundering or
15 concealment money laundering. I think either one is available
16 because that's the way the government pleaded it, and we are
17 talking here about a conspiracy charge. So as long as the jury
18 is satisfied that there is either concealment or promotional
19 money laundering as the object of the unlawful agreement there
20 could be a basis to convict.

21 Now, with respect to concealment, first of all, I
22 don't think -- and I think Ms. Carowan effectively recognizes
23 this, that there is not an automatic matter of law rule out
24 there, certainly not in the Sixth Circuit, that says if it's
25 concealment money laundering there can't be a merger problem.

1 But as a practical matter, it's hard to imagine a situation
2 where there would be a merger problem for the reason she
3 articulates. Namely, that in most concealment situations you
4 are dealing with alleged activity well after the underlying
5 unlawful activity was completed or occurred. Here the
6 smuggling the drugs from overseas into the country and the
7 concealment alleged includes things like funneling money
8 through different accounts to hide its true source.

9 That can't possibly be a merger problem in my view
10 because even though the account itself might incorporate
11 earlier allegations that deal with the smuggling conspiracy,
12 the fact or the concealment aspect of the money laundering
13 conspiracy would all involve activity well downstream from the
14 underlying offense.

15 So you have necessarily, it seems to me, on the
16 concealment theory alleged here, separate offenses, and even if
17 the underlying penalties are different for concealment money
18 laundering conspiracy, than for a smuggling conspiracy under
19 371, you don't ever get to that point under Santos-Kratt
20 because there is really not a merger problem from a factual
21 point of view.

22 The promotional aspect or the promotional theory of
23 the money laundering conspiracy is a little different. I think
24 there could be a Santos-Kratt issue in a promotional theory
25 like this, but at least the way the government alleges things,

1 and that will ultimately be a matter of proofs, the gross
2 revenue achieved from the sale of the goods was used to
3 purchase new smuggled goods, not pay for the original ones, and
4 if that's what the proofs show and that's what the government
5 theory develops, then there isn't, in my mind, a Santos-Kratt
6 problem because once again, you are dealing not with simply
7 completing or closing the loop of the original underlying
8 unlawful activity, but dealing with, you know, new activation
9 of yet a new round of drug sales.

10 So I don't think from what we've heard described here,
11 what we see described in the government's papers, there is a
12 Santos-Kratt problem even with the promotional prong. Even if
13 there were a problem with the promotional prong, I do agree
14 with the government that in a money laundering conspiracy
15 charge, either concealment or promotional proofs would be
16 sufficient to support a conviction. So I don't -- I don't
17 think that's a problem the government has to worry about and
18 I'll have to worry along with the parties downstream about what
19 the proofs show to decide whether there is ultimately a
20 Santos-Kratt problem on the promotional prong.

21 One sort of footnote on that, it's an interesting
22 point the government makes in its briefing. Didn't address so
23 much here today, but you know, can conceal -- charges of
24 conspiracy as opposed to a charge and conviction on the
25 underlying wrong itself really ever create a merger problem?

1 And in theory you'd think, well, probably not, because after
2 all, the independent wrong of the conspiracy is joining the
3 unlawful agreement itself. That said, I do agree with Ms. Cobb
4 that the Crosgrove decision she cited from the Sixth Circuit, I
5 don't know if I have that cite right handy, but the Crosgrove
6 decision, 637 F.3d 646, does involve Santos-Kratt analysis of
7 two conspiracies. So it was a new -- Santos was a brand new
8 case at the time Crosgrove was decided. Maybe that affects
9 things, but that alone would not lead me automatically as a
10 matter of law to say you couldn't have an issue.

11 I just think at this stage of the case on a motion to
12 dismiss there is no basis to grant that motion. I think the
13 government's charging document is sufficient to state crimes,
14 if, in fact, the proofs are developed as the government expects
15 and the jury accepts that. So for those reasons I do deny the
16 Defense motion as well as Mr. Ford's motion to join as to Count
17 1, so the case can proceed and we'll simply enter an order to
18 that effect.

19 Are there other things that would be helpful to do
20 today from the government's perspective?

21 MS. CAROWAN: May I have a moment, Your Honor?

22 THE COURT: Sure. Of course.

23 MS. CAROWAN: Thank you.

24 The only thing I might just point -- the Court raised
25 the timing of the final pretrial. I think currently the matter

1 is set for trial November 15th. I don't have the final
2 pretrial date at immediate recall without my calendar. I am
3 set actually to be in trial before another court before Judge
4 Neff on October 18th, but other than that I am fairly
5 available. I don't know if the Court wants to address that or
6 wants to address the trial date in light of the complicated
7 nature of the issues as well.

8 THE COURT: All right. Yeah. I don't have the date
9 in front of me either.

10 MS. COBB: I don't have it in front of me.

11 THE COURT: I am looking it up.

12 MR. GLEESON: Your Honor, if I may, I believe it's
13 October 31st.

14 THE COURT: Anything else that would be helpful from
15 the Defense perspective today?

16 MS. COBB: May I have just one moment, Your Honor?

17 THE COURT: Sure. Sure.

18 MS. COBB: I don't have anything, Your Honor. Thank
19 you.

20 THE COURT: All right.

21 MR. GLEESON: Nothing, Your Honor. Thank you.

22 THE COURT: Okay. Let me follow up, then, on the
23 timing issue. With an October 31 final pretrial date and
24 November 15 trial date, we have effectively got two weeks,
25 which is pretty normal. That may or may not be enough for a

1 case like this. From the parties' perspective, and I'll start
2 with the Defense I guess, would you like, you know, more like
3 three weeks, four weeks between final pretrial and trial or is
4 that not really an issue from your perspective?

5 MS. COBB: Well, I think my concern about doing that
6 is that we get dangerously close to the government's plea
7 cutoff date, which I think is two weeks prior to the final
8 pretrial. So we were already getting a little bit close to
9 that anyway, and that would be my -- that would be my main
10 concern is starting to back it up, backs us into we got to
11 decide about pleading guilty today, which, I mean, certainly is
12 something we have discussed, but I am not sensing that there is
13 a feeling like that's what we want to do right now.

14 THE COURT: Right. Well, I certainly wouldn't want to
15 put somebody in a position to have to decide that right away.

16 MS. COBB: Right. So I am open to what Ms. Carowan
17 thinks or what Mr. Gleeson thinks.

18 THE COURT: Why don't we do this. I wasn't even sure
19 if I was going to rule today or take things under advisement.
20 The parties don't know that for sure either. When there is a
21 trial scheduled I try a little harder sometimes to rule from
22 the bench so we don't necessarily interrupt that. But it may
23 be one of those cases where even if there is a ruling on a
24 motion to dismiss like this, there is things that both sides
25 want to talk about in order to satisfy themselves they are

1 ready to go to trial, and if that's the case and you need more
2 time we don't have any Defendant in custody. So in terms of
3 getting the parties the time they need to evaluate it's about
4 as easy an array of facts as we can imagine. You know, I
5 always worry about somebody in custody. Of course, even when
6 you are not in custody you are under a cloud. I get that. And
7 you want to move forward. But by the same token, it's not like
8 sitting in Newaygo. So there is -- if time is essential I'll
9 wait for the parties to tell me that and we'll make
10 adjustments, but you should all realize this is the kind of
11 case where that would make sense to me if the parties all agree
12 that that's in the service of justice. But you don't have to
13 decide that today either and you'd probably need some time to
14 chew on it. Think about it.

15 MS. CAROWAN: Thank you, Your Honor.

16 THE COURT: Unless there's anything from the parties
17 I'll let you go and I'll wait to hear from you if and when
18 there is something you need from me before final pretrial.

19 MS. CAROWAN: Nothing further, Your Honor. Thank you.

20 MS. COBB: Thank you.

21 THE COURT: Mr. Gleeson?

22 MR. GLEESON: Thank you, Your Honor. Nothing further,
23 Your Honor. Thank you.

24 LAW CLERK: Court is adjourned.

25 (Proceeding concluded, 4:05 p.m.)

REPORTER'S CERTIFICATE

I, Paul G. Brandell, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Paul G. Brandell

Paul G. Brandell, CSR-4552, RPR, CRR

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